

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in September 2015

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Default; Five Days' Notice; Counting Days; Ten Days; Notice of Conference; Receipt; Grievance Administrator
<u>CASE STYLE:</u>	<u>Mehra v. West Virginia University Potomac State College</u> DOCKET NO. 2015-1080-PSCWVUDEF (9/2/2015)
<u>PRIMARY ISSUES:</u>	Whether the level one conference was scheduled within 10 days of receipt of the grievance, and whether Respondent demonstrated justified delay not caused by negligence or intent to delay the grievance process in its failure to send out the notice of the level one conference at least five days before the conference.
<u>SUMMARY:</u>	The default provisions require that written notice of the level one conference be given at least five days prior to the conference, and that the level one conference be held within ten days of receipt of a grievance by the chief administrator. The level one conference was held within ten days of receipt of the grievance by the chief administrator. Notice of the conference was not sent to Grievant at least five days before the conference was held, however, because Respondent was having scheduling difficulties, and asked that Grievant agree to extend the timelines by one week, which he would not do. Grievant appeared at the level one conference, but refused to participate unless required to do so because he believed Respondent had defaulted by failing to hold the conference within 10 days of receipt of the grievance. Since Grievant had no intention of participating in the level one conference, and was able to appear at the conference, the failure to send the notice in a timely manner was a mere technical violation which did not result in any delay in the grievance process, and Grievant was not prejudiced by it.

KEYWORDS: Non-Retention; Probationary Employee; Performance Evaluation; Work Performance Issues; Probationary Period of Employment; Arbitrary and Capricious

CASE STYLE: Youngblood v. West Virginia State University
DOCKET NO. 2015-1422-WVSU (9/30/2015)

PRIMARY ISSUES: Whether Grievant proved that her performance was satisfactory and Respondent's decision to dismiss her was arbitrary and capricious.

SUMMARY: Respondent discharged Grievant during her probationary period of employment. Respondent was not satisfied with Grievant's job performance. There were identifiable issues of concern. Respondent elected to terminate Grievant during the probationary period, citing unsatisfactory job performance. Grievant contended her job performance was consistent with standard behavior and Respondent unjustly deprived her of permanent employment. Grievant did not meet her burden of proof. Grievant failed to prove violation of any statute, policy, rule or regulation. Accordingly this grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Selection; Newly Created Position; Regular Seniority; Summer Seniority; Bus Aide; Program Aide; Reduction in Force
<u>CASE STYLE:</u>	<u>Carpenter v. Logan County Board of Education and Terry Turner, Intervenor</u> DOCKET NO. 2015-0051-LogED (9/4/2015)
<u>PRIMARY ISSUES:</u>	Whether Grievant was entitled to be placed in the position of summer bus aide/program aide.
<u>SUMMARY:</u>	Grievant was regularly employed by Respondent as an aide in Logan County Schools holding a 200-day contract. Each year for about twenty years, Grievant worked an additional twenty days at the end of her contract term under contract extensions to provide services to students pursuant to their individualized educational programs. In the summer of 2014, Grievant was not asked to work the additional twenty days under a contract extension. Grievant applied for a summer bus aide/program aide position that was posted in June 2014. The job was awarded to Intervenor, who had served as a summer bus aide the two previous summers. Grievant argued that she should have been awarded the bus aide/program aide position as it was a newly created position and she had greater regular seniority than Intervenor. Intervenor and Respondent argue that the bus aide/program aide position was not a newly created position, and that Intervenor had held the position during the two previous summers; therefore, she was entitled to receive the position in 2014. Grievant proved by a preponderance of the evidence that the bus aide/program aide position posted in June 2014 was a newly created position, and that she was entitled to receive the same because of her greater regular seniority. Therefore, the grievance is GRANTED.

KEYWORDS: Insubordination; Misconduct; Willful Neglect of Duty; Extracurricular Assignments; Leaving Classes Unattended; Correctable Conduct

CASE STYLE: Cline v. Braxton County Board of Education
DOCKET NO. 2015-0904-BraED (9/23/2015)

PRIMARY ISSUES: Whether Respondent proved that Grievant intentionally neglected his duty leaving classes unattended and spending large portions of time he was supposed to be teaching to texting matters unrelated to instruction.

SUMMARY: Respondent terminated Grievant's teaching and coaching contracts after an investigation after a complaint was lodged by a local resident. Respondent alleged that Grievant was guilty of insubordination for violating rules and policies, and willful neglect of duty by spending large amounts of time texting while he was supposed to be teaching. Respondent failed to prove that Grievant intentionally violated policies and rules related to leaving school, but did prove Grievant was guilty of willful neglect of duty.

KEYWORDS: Termination; Corrective Action Plan; Professional Conduct; Fitness-For-Duty Evaluation

CASE STYLE: E. v. Berkeley County Board of Education
DOCKET NO. 2015-1635-CONS (9/21/2015)

PRIMARY ISSUES: Whether Respondent established that Grievant is incompetent to carry out her duties as a Teacher.

SUMMARY: Grievant's employment was terminated due to incompetency. This decision by Respondent was based on the findings and recommendation of an evaluation which found that Grievant was unfit for duty. The record also established that Grievant was provided with an improvement plan which might have led to correcting her behavior. The record established that Grievant was unable to accept the fact that she has difficulty interacting with supervisors, colleagues and students. In addition, the record established that Grievant was also unable to identify any strategies or accommodations that would allow her to resume her duties as a teacher. Respondent demonstrated by a preponderance of the evidence that Grievant is incompetent to perform the duties of her position.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Tiebreaker Drawing; Seniority Dates, Selection Process; Seniority

CASE STYLE: Swann v. Putnam County Board of Education and Sarah Nelson,
Intervenor
DOCKET NO. 2015-0755-PutED (9/2/2015)

PRIMARY ISSUES: Whether Grievant is entitled to the regular half time bus position in dispute.

SUMMARY: Grievant a substitute bus operator protest the loss (non-award) of a regular half time bus operator position. Grievant highlights past conduct of Respondent. Grievant contends that Respondent had an established practice of holding a separate distinct tie breaking seniority drawing for each available position among individuals with identical seniority dates. Grievant wishes the enforcement a second random tiebreaker. Respondent maintains despite any perceived inconstant actions in the past, its corrective actions in the circumstances of this matter are correct.

A random selection system was conducted among a group of individuals with identical seniority dates. The first drawing established the permanent seniority standing for and among those individuals involved. The priority between Grievant and Intervenor, who participated in the original random selection, is continual. No further tiebreaker drawing was necessary or appropriate. Facts of this grievance demonstrate that Respondent corrected an error pertaining to the proper recipient of a bus run position. Respondent corrected its error(s) in judgement. In the circumstances of this matter Grievant is not entitled to the regular half time bus position in dispute. Accordingly, this Grievance is DENIED.

KEYWORDS: Time Limits; Continuing Practice; Pay Disparity; Minimum Salary; Discrimination; Calculation of Pay

CASE STYLE: Rocchio v. Hancock County Board of Education
DOCKET NO. 2014-0621-HanED (9/2/2015)

PRIMARY ISSUES: Whether Grievant demonstrated that her salary was not properly calculated or that she is entitled to additional compensation under for her 240-day contract.

SUMMARY: Grievant is upset because the half-time Secretary III who regularly works three-and-a-half hours per day makes more on an hourly basis than Grievant when she fills in for Grievant in Grievant's absence. Grievant regularly works eight hours a day under a 240-day contract, and does not dispute that she is paid according to the Secretary III pay scale, which is set forth in the statutory scheme for school service personnel. The half-time Secretary III is also paid according to the statutory pay scale under a 240-day contract. Grievant did not demonstrate that she is being improperly paid, or that any statute, rule, regulation, or policy is being violated by requiring her to work eight hour days under the 240-day contract to which she agreed. Respondent's claim that the grievance was untimely filed operates to limit any relief granted to 15 days preceding the filing of the grievance under the continuing practice exception.

KEYWORDS: Overtime; Insubordination; Working Unauthorized Hours; Arbitrary and Capricious

CASE STYLE: Jaumot v. Harrison County Board of Education
DOCKET NO. 2015-0188-HarED (9/4/2015)

PRIMARY ISSUES: Whether Respondent established the allegations of misconduct on the part of Grievant.

SUMMARY: Grievant is employed by Respondent as a bus operator. Grievant was suspended without pay for ten days for working unauthorized hours over his allotted time. Respondent requires that all overtime and additional time beyond the employee's regular work day must have prior written approval from the Superintendent. Grievant had been disciplined in the past for the violation of this policy, and this was his third violation. Given the totality of the circumstances, the record supported a finding that Grievant engaged in the wilful neglect of duty in failing to get prior approval for time beyond his regular work day. This grievance is denied.

KEYWORDS: Compensatory Time; Overtime Pay

CASE STYLE: Francis, et al. v. Lewis County Board of Education
DOCKET NO. 2014-1080-CONS (9/16/2015)

PRIMARY ISSUES: Whether Grievants demonstrated that they are entitled to compensatory time off in lieu of overtime pay.

SUMMARY: Grievants claim that Respondent is required to allow them to take compensatory time off work in lieu of overtime pay, if approved by their supervisor. The level one decision and the policy on which Grievants rely for this premise use the word “may” when discussing the possibility of compensatory time off in lieu of overtime pay, a word which cannot be read as a requirement.

KEYWORDS: Extracurricular Contract; Discrimination; Favoritism; Assignments; Job Responsibilities; Groundsman

CASE STYLE: Cook, et al. v. Lincoln County Board of Education
DOCKET NO. 2015-0132-CONS (9/18/2015)

PRIMARY ISSUES: Whether Grievants proved that Respondent engaged in discrimination and favoritism when assigning groundsman work during July 2014.

SUMMARY: Grievants held extracurricular groundsman contracts with Respondent for the summer of 2014. Grievants received groundsman work assignments in June 2014, and in August 2014. A total of 68 hours of groundsman work was assigned during July 2014. However, Grievant Cook received only 7 hours of groundsman work assigned that month, and Grievant Salmons received none. The remaining 61 hours of work were assigned to two other employees who also held extracurricular groundsman contracts that summer. Grievants assert that Respondent engaged in discrimination and favoritism when it assigned the 61 hours of groundsman work to the other two employees. Respondent denied Grievants’ claims. Grievants proved their claims of discrimination and favoritism by a preponderance of the evidence. Therefore, this grievance is GRANTED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Untimely Filing; Continuing Practice; Classification Specifications; Pay Equity Raise Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Lilly v. Public Service Commission and Division of Personnel</u> DOCKET NO. 2015-0127-PSC (9/14/2015)
<u>PRIMARY ISSUES:</u>	Whether Grievant established that any particular personnel classification specification is a better fit for Grievant's duties than his current classification.
<u>SUMMARY:</u>	<p>Grievant is currently employed by Respondent PSC as a Utilities Inspector Supervisor in pay grade 14. Keith Jeffrey is currently employed by PSC as a Transportation Services Supervisor in pay grade 13. As of December 11, 2011, Mr. Jeffrey's annual salary was \$49,188, while Grievant's annual salary on that same date was \$40,224. Thus, Mr. Jeffrey was receiving approximately 22% more compensation than Grievant, although their assigned duties are substantially alike. This disparity is attributable to a substantial degree to a ten per cent pay equity raise which Mr. Jeffrey and thirty-nine other former DOH weight enforcement employees received in 2011. Grievant was aware of this discrepancy shortly after it was implemented but did not file this grievance until July 2014, after learning of a grievance filed by other PSC employees. PSC established by a preponderance of the evidence that this grievance was not filed within fifteen days of the event giving rise to this grievance, and Grievant failed to establish any valid basis to excuse his failure to timely file. Although Grievant's claim that he was improperly excluded from the ten per cent pay equity raise in 2011 is untimely, Grievant's claim that he is misclassified as a Utilities Inspector Supervisor involves a continuing violation which may be challenged at any time. In regard to Grievant's claim that he is misclassified, Grievant failed to establish by a preponderance of the evidence that any classification other than his current classification as Utilities Inspector Supervisor is a better fit for his duties, or that his classification as a Utilities Inspector Supervisor by the Division of Personnel involves an arbitrary and capricious exercise of the authority to assign classified employees to an established classification. Further, Grievant did not establish that his assigned classification is sufficiently deficient to warrant creation of another classification specification not presently in existence. Accordingly, this grievance must be denied.</p>

KEYWORDS: Dismissal; Jurisdiction; Pay Increase; Circuit Court Order; Salary; Pay Grade; Hartley

CASE STYLE: Hamilton v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital and Division of Personnel
DOCKET NO. 2015-0837-DHHR (9/10/2015)

PRIMARY ISSUES: Whether the Grievance Board has jurisdiction to hear this matter.

SUMMARY: Grievant is employed by Respondent as Chief Nurse Executive at Mildred Mitchell-Bateman Hospital. Grievant is classified as a Nurse Director II. Grievant's salary was increased in January 2015 as a result of action taken in an on-going civil action now pending before the Circuit Court of Kanawha County, West Virginia, and/or in accordance with West Virginia Code § 5-5-4a. However, Grievant's salary was increased to the maximum level allowed by Respondent DOP for her pay grade, and not the market rate salary for a Nurse Director II. Grievant alleges violations of the Circuit Court order and a general claim of discrimination. The Grievance Board lacks jurisdiction to enforce a Circuit Court order, or to compel compliance therewith. Further, West Virginia Code § 5-5-4a specifically exempts pay increases granted pursuant thereto from the grievance process. Therefore, Respondent DHHR's Motion to Dismiss should be granted, and this grievance, DISMISSED.

KEYWORDS: Disciplinary Demotion; Resident Lock Down; Riot; Facility Procedures; Policy or Procedure; Job Duties and Responsibilities; Supervisory Duties; Mitigation

CASE STYLE: Lott v. Division of Juvenile Services/Lorrie Yeager Jr. Juvenile Center
DOCKET NO. 2014-1605-MAPS (9/17/2015)

PRIMARY ISSUES: Whether Respondent was justified in demoting Grievant for his alleged supervisory failures.

SUMMARY: Grievant was demoted from his position as the Chief of Security at Lorrie Yeager Juvenile Center following a riot that occurred at the center. Grievant was accused of failures in judgment and leadership relating to the riot. Grievant was also accused of multiple other supervisory failures that occurred prior to the riot for which he had never been notified or given an opportunity to correct. Ultimately, Respondent failed to prove the majority of the allegations against Grievant. The few mistakes Respondent did prove Grievant made do not justify his demotion from his position. Accordingly, the grievance is granted.

<u>KEYWORDS:</u>	Termination; Medical Leave of Absence; Job Abandonment; Notice
<u>CASE STYLE:</u>	<u>Trozzi v. Grafton-Taylor Health Department</u> DOCKET NO. 2015-0880-GraCH (9/21/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent demonstrated good cause for Grievant's dismissal.
<u>SUMMARY:</u>	Grievant was dismissed from her employment by Respondent for job abandonment. Respondent granted Grievant an open-ended medical leave of absence without pay, and at the end of six months, failed to notify her that her medical leave of absence would end or had ended, or that she could request a personal leave of absence without pay. Respondent did not demonstrate that Grievant abandoned her job or that her dismissal was for good cause under the facts presented.
<u>KEYWORDS:</u>	Suspension; Inmate Count; Daily Shift Count Sheet; Progressive Discipline Policy; Unsatisfactory Performance; Mitigation
<u>CASE STYLE:</u>	<u>Thomas v. Division of Corrections/Beckley Correctional Center</u> DOCKET NO. 2015-1120-MAPS (9/22/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent's distinction in the level of discipline was reasonable.
<u>SUMMARY:</u>	Grievant grieved a three-day suspension he received due to his continued unacceptable performance and violation of policy and operational procedure as a Shift Commander. Respondent proved Grievant personally entered incorrect inmate count information and failed to ensure that the inmate count was correct before clearing the count. Respondent proved Grievant's failures were a violation of policy and operational procedure. Respondent was justified in suspending Grievant for three days for his continuing unacceptable performance and violation of policy and operational procedure. Grievant did not prove mitigation is warranted. Grievant's conduct was serious, he had a history of prior discipline and unsatisfactory performance, and Respondent's distinction in the level of discipline received by involved officers was reasonable. Accordingly, the grievance is denied.

KEYWORDS:

Annual Leave; Witness and/or Jury Service; Personal or Familial Interest; Arbitrary or Capricious; Misapprehension of The Law; Private Interest; Public Duty; Unjust Enrichment; Legal Right; Tangible Material Benefit; Financial Benefit; Statutory Construction; Right, Privilege or Power

CASE STYLE:

Ferris v. Department of Health and Human Resources/Bureau for Child Support Enforcement and Division of Personnel

DOCKET NO. 2014-1562-DHHR (9/29/2015)

PRIMARY ISSUES:

Whether Grievant was improperly denied paid Witness/Jury service leave, based upon her "personal interest" in the proceedings, when subpoenaed to appear at a criminal trial.

SUMMARY:

Grievant asserts that Respondents' decision that she was ineligible for paid Witness/Jury Service leave when she appeared, under subpoena, to testify at the trial of her mother's accused murderer, was arbitrary and capricious in that Respondents construed and applied DOP Administrative Rule, W. Va. Code St. R. §143-1-14.10.a. 'Court, Jury, and Hearing Leave,' and the W. Va. Division of Personnel Witness/Jury Service DOP Policy, DOP-P10 (Feb. 1, 1994) improperly in arriving at their decision. DOP Administrative Rule, W. Va. Code St. R. §143-1-14.10 generally provides for witness and/or jury service leave in compliance with a subpoena. The principal dispute is over the proper interpretation and application of the "personal interest" exception in these directives. Respondents argue that if a State employee may be "affected," in terms of his "private life, relationships, and emotions," by the proceeding in which he has been subpoenaed to testify, then the employee is not entitled to paid court leave. Under this definition, Respondents assert that they properly concluded Grievant had a "personal interest" in the trial of her mothers' alleged murderer. Respondents' interpretation and application of the "personal interest" exception is erroneous, arbitrary and capricious, leading to unjust results. Applying the "ordinary and accepted" meanings to "personal interest," in order for this exclusion to operate, the State employee must have some "private" (pertaining to his private life, as opposed to his professional life), legal right or concern in the proceeding, such that he/she stands to derive some tangible material (e.g., interalia, real or personal property) or financial benefit from the outcome of the proceeding. In addition, the "personal interest" exclusion operates, by its plain language, to exclude payment of Witness/Jury Service leave if the employee stands to derive some private "right, privilege or power" based upon the outcome of the proceeding. Even if this definition does not reflect the "plain meaning" of personal interest, these terms have been properly construed so as not to contravene the presumptive Legislative intent of DOP Administrative Rule, W. Va. Code §143-1-14.10. As part of its rationale in promulgating DOP Administrative Rule, W. Va. Code

St. R. §143-1-14.10, the Legislature intended to protect the State employee from monetary loss when he is compelled to appear under subpoena in a criminal action in which he is not a defendant, because the employee is fulfilling his public duty, rather than pursuing his own private interests. Grievant has proved by a preponderance of the evidence that Respondents' decision to charge her accrued annual leave for compliance to a subpoena in a criminal case in which she was not a party was based upon a misapprehension of the law and criterion that were inappropriate for consideration. Therefore, their decision was arbitrary and capricious. Thus, the undersigned must conclude that Grievant was not precluded from eligibility for Witness/Jury service leave under the Administrative Rule and DOP Policy. The grievance is granted.